

Transportation Manpower Services of Ohio, Inc. and Michael O'Boyle. Cases 27-CA-7692 and 27-CA-7762

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 29 December 1983 Administrative Law Judge Frederick C. Herzog issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Transportation Manpower Services of Ohio, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. III, C, of his decision the judge stated that there does not "seem to be any plausible explanation for [Supervisor] Dudek's claim, in the course of the telephone conversation with [alleged discriminatee] O'Boyle several days after each of them had been discharged by Respondent, that he never passed any knowledge he had of O'Boyle's union activities on to his superiors in Boston." However, earlier in his decision the judge specifically found that O'Boyle admitted that Dudek claimed not to have passed such knowledge on to anybody else within the Respondent's organization and it is clear from the judge's decision that he in fact found that the Respondent's officials in Boston did not have actual knowledge of O'Boyle's union activities at the time the determination was made to discharge him.

² No exceptions were filed to the judge's conclusion that the Respondent violated Sec. 8(a)(1) of the Act by asking an employee to find out about the union activities of fellow employees and to report back about them.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. I heard this case in trial at Denver, Colorado, on September 16 and 17, 1982. Based on charges filed by Michael O'Boyle between January 18 and March 15, 1982, against

Transportation Manpower Services of Ohio, Inc. (Respondent) the Regional Director for Region 27 of the National Labor Relations Board issued a complaint, subsequently amended and consolidated, alleging in substance that Respondent violated Section 8(a)(1) of the Act by various means during the last quarter of 1981, and that Respondent violated Section 8(a)(3) of the Act by discharging its employees, O'Boyle and Clarence R. Blakeley Jr., in early 1982. Additionally it was alleged that Respondent's discharge of Blakeley was violative of Section 8(a)(4) of the Act. Respondent generally denies the allegations of wrongdoing.

All parties were given full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is an Ohio corporation maintaining an office and place of business at Denver, Colorado, where it is engaged in the business of interstate transportation of automobile parts for Chrysler Corporation. It annually provides services to Chrysler valued in excess of \$50,000, transporting parts directly to points and places outside the State of Colorado.

Accordingly, as Respondent admits, I find that Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The International Association of Machinists & Aerospace Workers, District Lodge, AFL-CIO, is, and at all times material herein has been, as admitted by Respondent, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent's home office is in Dedham, Massachusetts.¹ However, since March 30, 1981, it has contracted to deliver automobile and truck parts from Chrysler's depot in Denver, Colorado, to Chrysler's dealerships in Colorado, Wyoming, Utah, and parts of New Mexico, Nebraska, and Texas.

Respondent's predecessor in performing these deliveries was D.P.D., a division of the Ryder Corporation. Ryder's 10 drivers had been organized and represented by Transportation, Technical Warehouse, Industrial and Service Employees Union, a/w D.2. MEBA-AMO, AFL-CIO. One of Ryder's five drivers stationed in Denver was O'Boyle. Three of Ryder's drivers were stationed in Salt Lake City, and two in Albuquerque. Brief-

¹ At various points in the record the home office or officials based there are generally referred to as "Boston."

ly described, Ryder's operations consisted of six routes out of Denver. Chrysler employees loaded trailers at the depot and Ryder's drivers then drove Ryder tractors to various delivery points. Chrysler furnished the drivers with delivery papers and keys to dealerships, so that deliveries could be made after regular working hours. Denver drivers drove their rigs to transfer points and exchanged them for empty ones in or near Eagle, Colorado, and Laramie, Wyoming, as well as near Trinidad, Colorado, at Raton Pass.

When Respondent succeeded in securing the contract with Chrysler to perform the work previously done by Ryder the operation's broad outlines appear to have changed very little, though it did station 6, rather than 5, drivers in Denver.²

B. O'Boyle's Case

O'Boyle was among the five Ryder drivers hired by Respondent.³

O'Boyle was hired by Respondent by an official named Robert Mann,⁴ who interviewed him and, so O'Boyle claims, promised that his pay would be consonant with that which he had received as a driver for Ryder. Respondent conceded that O'Boyle had been highly recommended by Ryder's manager, and that O'Boyle showed a definite desire for the job. Indeed, due to O'Boyle's experience, he was hired at a pay rate greater than the other drivers, and received greater fringe benefits, such as length of vacation. O'Boyle stated that the interviewer gave him to understand that Respondent was opposed to its employees forming a union and asked him his sentiments on the subject. O'Boyle responded that his sentiments were against having a union.⁵

Respondent's interviewer Mann was not called as a witness to refute any of the statements. However, there is no allegation by the General Counsel that Respondent violated the Act in March or April 1981, and I see no point in discussing this further, as it appears that these or similar actions were discussed and remedied in the case decided by Judge Kennedy, referred to earlier herein.⁶

² The recital of Ryder's operations, set forth above, is gleaned from the briefs filed by the parties, in addition to the decision of Administrative Law Judge Harold Kennedy dated August 9, 1982, to which no exceptions were filed. (See JD-SF-192-82.)

³ Judge Kennedy also found that Respondent discriminatorily refused to hire two former Ryder drivers, pursuant to its "fixed plan or design" to avoid hiring more than 50 percent of the drivers who had worked for Ryder, so as to avoid having to deal with the union which represented Ryder's drivers.

⁴ While Respondent had a supervisor in its Denver office, the record is clear that much authority, including personnel matters such as terminating an employee, was reserved to officials in its home office.

⁵ Another former employee, Bob Holland, testified that when he was interviewed for his position with Respondent on March 28, 1981, the interviewer asked his opinion of unions, and he responded that he did not care one way or the other, to which Respondent's interviewer rejoined that the Respondent was seeking employees who were not pronoun. Apparently whatever Holland had to say was sufficient for Respondent's purposes, as he was thereafter hired.

⁶ I find no evidence to support, and the General Counsel appears to have abandoned, the allegations of par. V(a) of the complaint to the effect that Respondent's supervisor Dudek sometime during early October 1981 told employees that the terminal would be closed and moved if a union came in. Accordingly, this allegation must be dismissed.

As O'Boyle's employment with Respondent progressed into the summer of 1981 problems began to develop. In O'Boyle's view Respondent was failing to live up to its promise to pay him properly. According to Respondent, O'Boyle was showing himself to be something less than the superior driver and employee it had counted on when it made the decision to hire him. The resultant bad feelings was evidently compounded when O'Boyle began a series of phone calls directly to Boston, speaking to a whole array of Respondent's officials, concerning problems he was encountering and his perceived unfair treatment at the hands of Respondent.

Respondent's unhappiness over his performance was conveyed to O'Boyle by means of its June 5, 1981 "60-day evaluation" in which he was told, among other things, that "I look for a DRASTIC AND IMMEDIATE IMPROVEMENT. We both know that your abilities far exceed your performance thus far, and I, for one, want to see exactly how good you are." Among the reasons cited in the evaluation for his poor appraisal was the "dropping" of a trailer and alleged poor gas mileage. O'Boyle claimed that he called Boston and succeeded in defending himself against the charges. Respondent's records however indicate that O'Boyle was beginning to be thought of as an expensive personnel mistake by Respondent.

In July 1981 O'Boyle's work was given a 90-day review. In that review his overall rating was that of an average employee. It was noted, however, that, while he seemed "warm, sociable and friendly," his "personality was satisfactory for the job," and he was exhibiting sufficient courtesy to others, he nonetheless "occasionally 'blows up' under pressure and is easily irritated." The narrative comment was that "Mike thinks he knows more than anybody else. Talks too much. Likes to fool with trucks." It was acknowledged that O'Boyle knew all the routes.

Before this last mentioned appraisal actually reached him, O'Boyle once more called Boston, this time speaking directly to Respondent's senior vice president Bruno. According to Bruno's credited testimony O'Boyle's initial tone of complaint was rebuffed and thereafter, in the same conversation, O'Boyle's approach changed to one of hope and assurance that no more complaints would be received.

Following the issuance of the 90-day review all Respondent's drivers except O'Boyle were given raises. On September 9, 1981, so he testified, O'Boyle had a truck breakdown near Scottsbluff, Nebraska. As a result he was paid a lesser wage than he thought he was entitled to. Though he called Boston, he failed to convince Respondent of the justice of his cause.

O'Boyle claimed that it was soon thereafter that he began promoting unionism with others among Respondent's work force, eventually speaking to each and every one of them by mid-January 1982. His theme was that they should get a union in order and to compel Respondent to live up to its prior agreements. Additionally, he recalled that sometime in December or January 1982 he contacted a union and succeeded in securing and distributing authorization cards among other employees.

The Union's business agent corroborated O'Boyle's testimony in part. He was unable to recall the initial date that he was contacted by O'Boyle, though he placed the event no earlier than "the first part of January 1982." He also recalled that several telephone conversations led to meetings on January 14 and/or 16, 1982, at which time O'Boyle was supplied with authorization cards to be used in securing a showing of interest from fellow employees.

Thus, it is unclear whether or not O'Boyle actually performed concrete actions in support of the Union before the date he was fired, January 15, 1982. Even O'Boyle admitted that after he "sounded out" his fellow drivers he distributed the authorization cards by going down to Respondent's premises as soon as he got them, a couple of days *after* he was fired.

The General Counsel attempted to corroborate O'Boyle's testimony concerning his union activities by the testimony of Bob Holland, who stated that O'Boyle first began talking to him about the cause of unionization in June 1981, months before O'Boyle stated that he began talking about unionism. Holland would have it that he talked on numerous occasions with O'Boyle up until Holland was discharged on January 6, 1982, and that their conversation culminated in O'Boyle asking him if he would sign a union card should he be provided with one. Holland estimated that they discussed this subject some 30 or 40 times. Indeed, it seems evident that the General Counsel seeks to prove both that Respondent had knowledge of O'Boyle's activities and that it unlawfully interrogated Holland regarding such activities through Holland's testimony to the effect that on numerous occasions Dudek asked him questions concerning the drivers, and specifically about O'Boyle and union activities.

It is clear that few of the conversations referred to above are encompassed by the pleadings. It is equally clear that no party was successful in securing the testimony of Dudek, who was discharged by Respondent shortly after O'Boyle was discharged. Since Respondent, in its brief, admits that it violated Section 8(a)(1) of the Act to the extent that the record shows that Dudek interrogated employees regarding their own or others' union activities it must be found that, whatever the date, Respondent did engage in violative conduct.⁷

In November O'Boyle was making a delivery at Perkins Chrysler Plymouth. For some reason O'Boyle's equipment and the building evidently became entangled, causing slight damage to the building and, perhaps, to a lock or gate as well. In any event O'Boyle apparently chose to telephone the owner of the business at his home in the early evening, rather than Respondent's office. Complaints ensued in succeeding days from both the owner of the business and from Chrysler, expressing some displeasure with O'Boyle's alleged mishandling of the equipment and disturbance of the business' owner at

home. Respondent claimed it was required to buy a new lock and chain for the Chrysler dealership to replace some damaged parts.

Respondent claims that shortly thereafter O'Boyle engaged in another act of misconduct, i.e., complaining loudly in front of Chrysler employees about Respondent's equipment and maintenance procedures while at the Chrysler facility. Whatever the cause Respondent claims that representatives of Chrysler called it and questioned whether or not they were performing adequate maintenance work on their trucks, the question being based on O'Boyle's alleged outburst. Nonetheless, in early December Dudek evaluated O'Boyle's performance as definitely above average, while still noting weak points of trying to take too many things into his own hands and irritating other drivers. Dudek commented that O'Boyle's major problem was that he "just plain talks too much."

Around December 22, O'Boyle once again phoned Boston with a complaint. By Respondent's version O'Boyle was upset about counting the Christmas holiday against his vacation time. Respondent contended that O'Boyle spoke to a man named Bill Ricardo during this conversation and referred to Respondent as a scummy company, run by scummy people. Allegedly he went further, indicating that he did an excellent job and that he was the cause for Respondent's securing the contract with Chrysler, but insinuating that he could do something to cause it to lose that contract. However, the fact of the occurrence of this alleged tirade by O'Boyle was not supported by evidence from Ricardo, but only by Bruno's notes on what Ricardo reported about the conversation. Nonetheless it appears clear that a conversation bearing at least facial resemblance to that reported by Ricardo did occur about December 22. For O'Boyle admitted on cross-examination that he may have argued with Ricardo about that date, that he was upset during that phone conversation, and that he may have claimed he had been doing a good job and was partly responsible for keeping Respondent's contract with the Chrysler corporation. However, he denied that he ever used the word "scummy" or that he threatened to jeopardize the contractual relationship between Respondent and Chrysler.

Thus, events led to the fateful day of January 12, 1982, when O'Boyle again called Ricardo. According to Respondent it was this call, taken together with his call to Ricardo in December, and taking into account all of the various strengths and weaknesses evidenced by the matters set forth previously herein, which led directly to O'Boyle's discharge on January 15, 1982.

Robert Norton, Respondent's vice president of operations, testified that Ricardo reported to him concerning his phone conversation with O'Boyle in December, including the fact that O'Boyle had made veiled threats about his performance and cooperation in the future. According to Norton, Ricardo also said that O'Boyle claimed he was responsible for much of Respondent's contract with Chrysler and that he could "fix that." At no time, however, was there any mention of O'Boyle being involved in union activities. Norton denied that he was aware of such activity.

⁷ It should be noted that I find the General Counsel's attempt to secure corroboration from Blakeley that Dudek frequently inquired about O'Boyle's union activities, and reported on the same to Boston, as inadequate. Blakeley's testimony in this was afflicted with the same defects in demeanor which has caused me to discredit Blakeley in other respects herein.

Bruno also claimed to have received a report from Ricardo regarding a call from O'Boyle, in which O'Boyle complained regarding his vacation schedule and insinuating that he might not work so hard in the future, all the while making vitriolic remarks about Respondent and its officials.

Thus, when O'Boyle phoned Ricardo on January 12, 1982, it seems unsurprising, from Respondent's point of view, that Ricardo should have motioned for Norton, who happened to be present with him at the time the call was received, to get on the line and listen. According to Norton he did so, but not before first contacting Bruno and asking him also to get on the line. Both Norton and Bruno claimed they got on the line without O'Boyle knowing it and that neither of them said a word while listening to the conversation between O'Boyle and Ricardo. Ricardo was not called, nor was his absence explained. However, as reported by Norton, O'Boyle was talking loudly about his vacation and holiday pay, complaining about a number of items so rapidly that Ricardo had no chance to respond. Norton stated that O'Boyle became abusive and threatened not to cooperate in the future by, for example, failing to take his tool kit with him while on the road. Norton also recalled that O'Boyle referred to Respondent and to each of its managers as "scummy," and "scummy assholes." He said that O'Boyle referred to the fact that he had keys to Chrysler's customers, indicating that O'Boyle was making veiled threats to do some harm in the places of business of those customers unless his demands were met. He also stated that O'Boyle claimed that he could and would ruin Respondent's contract with Chrysler. He claimed that O'Boyle threatened to allow the tractors used in Respondent's business to run out of oil. As Norton recounted the conversation it was filled with obscenities with reference to the corporation and management officials.

Bruno testified that he began listening to the conversation referred to above by Norton after Norton "buzzed" him and indicated for him that he should pick up the line. He said that O'Boyle had specifically referred to him as a "scummy asshole," that perhaps he would fail to check the level of engine oil and allow the tractors to be damaged thereby, and that O'Boyle made veiled threats regarding Chrysler's customers to which he had keys.

At the conclusion of the conversation, according to Norton and Bruno, Respondent determined to discharge O'Boyle. According to Bruno, O'Boyle was fired because of the abuse he heaped on the Company by his swearing, insulting management, and threatening to possibly damage the Company's equipment. Norton, while acting pursuant to Bruno's orders, nonetheless had a slightly different list of reasons why O'Boyle was fired. Norton would have taken into account not only the phone calls of January 12 and December 22 to Ricardo, including their alleged threats and insults, but also other factors, such as, that O'Boyle was no more than an average employee, that his attendance was not the very best, and the alleged destruction and complaints caused by O'Boyle which resulted in complaints to Respondent from Chrysler.

Both Norton and Bruno denied that O'Boyle's union activity played any part in the decision to terminate him, or that they even knew of such activities. They claim, instead, that Dudek had never passed such knowledge to them, if in fact Dudek was aware of it.

O'Boyle admitted to a number of conversations with various members of Respondent's management throughout late 1981 and into January 1982. He seemed quite unsure, however, as to who he had spoken to. Whoever it was, he denied that he used profanity, or that he became abusive on the phone. He denied threatening to damage company equipment or to, in effect, lay down on the job. He specifically denied that he made any personal attacks on management personnel.

On Friday, January 15, 1982, pursuant to instructions he had received from Boston, Dudek fired O'Boyle. O'Boyle stated that he asked Dudek why he was being fired and Dudek responded that Norton had called and told of O'Boyle's threats to do damage or break into a dealership. At that O'Boyle claimed to Dudek that he was being fired for unionism and that he did not make the mistakes attributed to him. Thereafter, in order to secure his last paycheck, O'Boyle called Norton and was allegedly told that the reason why he was discharged was that Respondent did not like the way he had talked to Management Officials Fisher and Ricardo. Once more O'Boyle claimed he was being discharged because of union activities, which Norton denied. Dudek was not called by either party to testify about this matter. Thus, as previously noted, the General Counsel's evidence of Dudek's violation of Section 8(a)(1) stands rebutted.

Additionally, however, there is a question with respect to whether or not Dudek had knowledge of O'Boyle's union activities and whether or not he passed it on to upper management or chose to keep it to himself. And, finally, a question is raised as to whether or not Dudek could shed any light on the motivations underlying O'Boyle's discharge.

Each of the parties and their counsel had telephone contacts with Dudek shortly preceding the trial. Dudek himself was discharged within several days after O'Boyle was discharged. And only a few days preceding O'Boyle's discharge he had spoken privately with O'Boyle about the possibility of his securing Respondent's contract with Chrysler and cutting Respondent out of the scene. O'Boyle recalled, while recounting Dudek's recitation of his hopes or plans, that Dudek stated that his greatest difficulty would be in managing to avoid becoming entangled with the Union.

Nonetheless, both parties admitted in their briefs that because of the circumstances surrounding Dudek's discharge, and the efforts of each side to secure his testimony, no adverse inference is to be drawn against either party because of either side's failure to produce him as a witness.

It remains a fact that even O'Boyle admits that Dudek denied that any union activity had played a part in O'Boyle's termination at the time he was asked about it during the termination interview. Moreover, O'Boyle admitted that he telephoned Dudek several days later, at a time when both had been discharged. O'Boyle asked

Dudek if he had been aware of union activities, and, though he claimed Dudek admitted that he had known about them, he also admitted that Dudek claimed not to have passed such knowledge on to anybody else within Respondent's organization. As noted earlier herein, Blakeley's testimony was not credible, including that here Dudek supposedly asked Blakeley who was pushing the Union, whether it was O'Brien, and whether or not Blakeley would agree to find out and report back.

Both Bruno and Dudek testified to the effect that they had been surprised by Dudek's report via telephone following O'Boyle's discharge regarding O'Boyle's claim that the real reason behind his discharge was his union activities. Dudek was therefore asked to submit a further report. Dudek's report indicated that he responded to O'Boyle's claim during the termination interview by professing ignorance of what O'Boyle was talking about, to which O'Boyle responded that "maybe you don't [know of my union activities], but that goddamn scum company does."

C. Conclusions Regarding O'Boyle's Discharge

This case appears to turn almost wholly on the credibility accorded the various witnesses. The resolution of credibility questions is particularly difficult in this instance, however, because, judging by their demeanor, the majority of witnesses in this case are simply not to be believed.

O'Boyle was glib, even expansive and personable at times. But no one watching his efforts to magnify, his air of superiority, his readiness to blame others for even trivial allegations of misconduct laid at his doorstep, and his general evasiveness and arrogance while testifying could be left with anything other than feelings of queasiness in attempting to sift out the truth from his verbose answers.

Holland was little, if any, better. He was probably angry at Respondent, and biased against it, perhaps based on the fact that he too was discharged by Respondent. He was obviously all too willing to insert characterizations and opinions into his testimony, as he assumed the role of one of the adversaries in this case. He repeatedly sought to demonstrate his cleverness; in my opinion he demonstrated instead his bias and his unwillingness to refrain from argument or evasion.

Clarence Blakeley seemed somewhat more truthful than either O'Boyle or Holland, but he too was guilty of evasiveness and rambling, hiding in the smokescreen of a "good ole boy" and playing for sympathy. His bitterness over not being selected as the manager to succeed Dudek was palpable, and appeared to me to account for his inability to testify credibly or accurately.

On Respondent's side of the table matters were only slightly better.

John Cobb, the interim manager who followed Dudek, had no testimony concerning O'Boyle's case. From Respondent's standpoint that is regrettable, for I found him highly credible. He seemed honest and earnest as he testified and I have no reason to doubt his accuracy.

Norton far surpassed the General Counsel's witnesses in his demeanor. But it remains a fact that he was guilty of fabrication, as was shown during his cross-examina-

tion. It was demonstrated that he lied during the course of sworn testimony at an unemployment compensation hearing concerning O'Boyle's discharge. I find it somewhat implausible that he would claim that he knew nothing of O'Boyle's union activities but, on being advised that O'Boyle was claiming that he had been engaged in such activities, he failed to do anything to ascertain the accuracy of O'Boyle's assertions. Unlike the General Counsel I would not find that his failure to list additional reasons why O'Boyle was thought to warrant discharge in the affidavit he provided the General Counsel in the course of the investigation of this case to be indicative of an effort to fabricate; rather, it seems to me more likely that Norton was simply something less than complete. Nevertheless, it cannot be adequately explained why he would so directly and falsely, as he admitted he did, deny under oath to the unemployment compensation hearing referee that he had been on the phone and had overheard the fateful conversation between Ricardo and O'Boyle on January 12. It is possible, as he claims, that he simply wished to avoid disclosing to O'Boyle that he had overheard that conversation, inasmuch as he "knew" that he would not prevail in the unemployment compensation hearing and did not want to provide O'Boyle with an opportunity to rearrange or fabricate his own testimony. All that is a possibility, but I see little reason to believe it. Accordingly, I have determined to credit Norton's testimony only in instances where it is corroborated, or seems consistent with facts which are objectively demonstrated or which are not in dispute.

Bruno was a voluble, assertive, and domineering personality by my observation. His testimony was replete with attempts to rationalize and ramble. Nevertheless, despite my misgivings about his credibility, I found him a superior witness to any offered by the General Counsel. Accordingly, in areas of conflict, I have determined to credit him.

Given these credibility resolutions I find O'Boyle's case lacking in merit.

It cannot be disputed that O'Boyle engaged in union activities. When they began and just how widespread they became seems, however, open to question. O'Boyle claims that he talked to all of the drivers. Yet only Blakeley and Holland appeared to corroborate his testimony and, as noted earlier, each of these men were themselves discharged by Respondent and testified in such fashion as to raise serious doubts about their credibility. So, while I tend to discount much of what O'Boyle claimed, it cannot be disputed that he did engage in some union activities, especially after his telephone calls to Boston which emanated from his truck breakdown in Scottsbluff, Nebraska, on September 9, 1981.

Nor does it seem open to doubt that Respondent harbored animus against the Union, or any other labor organization which might seek to represent its employees. Both O'Boyle's and Holland's testimony concerning Respondent's expression of animus toward unions during the course of their separate hiring interviews is largely undisputed. Thus, notwithstanding their shaky credibility, I am inclined to give it some weight. Additionally, I

believe that the events set forth in Judge Kennedy's decision, bearing so closely on the events in controversy here, should be found to warrant an inference that Respondent here harbored animus against unions. I so conclude.

I have substantial doubt as to whether or not the officials of Respondent responsible for the decision to discharge O'Boyle had knowledge of his union activities until he had been discharged. Their denials are not, of course, directly refuted by O'Boyle. As noted earlier, I have found Bruno to be a somewhat more credible witness than O'Boyle. Norton's testimony in this respect seems to be consistent with that of Bruno and, accordingly, worthy of some small credence.

Additionally, the circumstances in this case seem to me to support the view that Dudek never passed on whatever knowledge he may have had of O'Boyle's activities or sympathies in favor of a union. First of all Dudek was clearly a disaffected supervisor who, even according to O'Boyle's account, made plans to subvert Respondent's contract with Chrysler and take it over for himself. Additionally even O'Boyle confessed that Dudek professed surprise, apparently genuine, to O'Boyle concerning O'Boyle's accusation that he was being discharged for union activities. Nor does there seem to be any plausible explanation for Dudek's claim, in the course of the telephone conversation with O'Boyle several days after each of them had been discharged by Respondent, that he never passed any knowledge he had of O'Boyle's union activities on to his superiors in Boston. Thus in light of my unwillingness to credit the apparently fanciful and biased testimony of Holland and Blakeley on this point, and despite my awareness that the Board generally imputes the knowledge of a supervisor to the company employing him,⁸ I cannot conclude in this case that the General Counsel has persuaded me that the Respondent's officials had actual knowledge of O'Boyle's union activities at the time the determination was made to discharge him.

Moreover, even if they did have knowledge, it seems to me that O'Boyle was truly the type of employee who "led with his chin" in his dealings with his Employer. Granting, for the purposes of this decision, the General Counsel's argument that Respondent has sought to magnify and embellish O'Boyle's faults and transgressions, I must still conclude that in crediting Bruno over O'Boyle with respect to the events of January 12, 1982, I am led inescapably to the conclusion that O'Boyle's activities during that conversation furnished ample just cause for his discharge. Certainly no employer or employer's official is obliged to suffer insults and innuendos and veiled threats of the sort I have concluded were made by O'Boyle in the course of that conversation. Given my impression of Bruno throughout this trial as a man who would brook little opposition I find myself quite ready to believe that it was O'Boyle's confrontational style of problem-solving which led to his discharge, rather than any union activities he may have engaged in prior to that time which, it must be remembered, were confined to discussions with fellow employees and did not rise to the

level of actually securing any authorization cards until after he had been discharged.

Thus, I conclude and find that O'Boyle was discharged for just cause and not for discriminatory motivations violative of Section 8(a)(1) and (3) of the Act. Accordingly, this portion of the complaint must be dismissed.

D. The Discharge of Clarence Blakeley

Clarence R. Blakeley was a dockman and relief driver who also worked in the office part time for Respondent between early April 1981 until March 1982, when he was fired.

The events immediately proceeding his discharge when related by Blakeley: He testified that around March 2, 1982, he overheard Cobb, the interim manager, and Hensley, the man hired to become the permanent manager of the Denver office, a position for which Blakeley had applied. Blakeley was obviously and deeply disappointed in not receiving the position himself. He said that he heard them talking on the phone to someone concerning employee hours. He went on to say that soon thereafter he asked to speak to Hensley and asked him if Respondent was going to start cutting hours. Blakeley claimed that he went on to threaten to go to the NLRB regarding O'Boyle's complaint if his hours were cut. Next morning, according to Blakeley, Hensley stated that he had to let Blakeley go because of his attitude and refusing to carry loads. Blakeley responded by saying that it was a trumped up charge. He then left.

Norton denied Blakeley's charge. He claimed, instead, that Blakeley was discharged because of poor job performance. Elaborating, he spoke of two runs to Raton Pass to meet with other drivers coming in the opposite direction from Albuquerque, one of which was canceled by Blakeley and the other of which was protested, apparently due to weather conditions. Additionally, he spoke of an alleged unwillingness by Blakeley to cooperate with the drivers whom he met in Raton Pass, in that Blakeley declined to extend his route some miles past the normal meeting point in Raton Pass. Finally, Norton justified Blakeley's discharge by an incident that occurred between Blakeley and a Chrysler employee on the loading dock on February 24, 1982.

The gist of these alleged offenses is evidently admitted by the General Counsel. Around February 3, 1982, Blakeley, fearing the approach of a severe snowstorm, called the port of entry and claimed to have learned that it was closed due to the weather. He then elected not to drive his run to Raton Pass. While there is some question as to whether or not Cobb acceded to Blakeley's request that he not be compelled to drive that night out of exasperation, or simply because he was presented with a fait accompli, Cobb, in fact, did agree to Blakeley's handling of the matter and he did tell Blakeley that he did not have to drive the run that night.⁹ Several days later

⁸ See *Dr. Phillip Medal, D.D.S., Inc.*, 267 NLRB 82 (1983).

⁹ While considerable testimony was taken about whether or not Respondent had a practice, or would have allowed a practice, of drivers' calling the port of entry to determine weather conditions or to have checked them from other sources, I am satisfied that Blakeley and

Continued

Cobb and Blakeley disagreed as to whether or not Blakeley had or should be allowed to effect his own changes in his work schedule. This came about because Blakeley occasionally allowed driver Ed Carnavale to drive his route on Fridays. Cobb called Blakeley at home and told him that his scheduled route should be run by him, as he wanted Carnavale to do another driver's route due to the other driver having been up all night. Blakeley drove the run without further protest.

Another disagreement arose between Blakeley and Cobb when, according to Cobb, complaints were received from the Albuquerque drivers that Blakeley was not meeting them in a timely fashion or the proper place due to the fact that they had to wait a long time, in a very exposed and cold place at the top of the pass. Apparently they were suggesting that Blakeley should simply extend his route a bit further and drive on to Raton, New Mexico. Blakeley, on the other hand, insisted that to have done so would have unduly extended his run and would cause him to violate DOT regulations.¹⁰

It seems agreed, however, that the Respondent's main reason for discharging Blakeley was an incident that occurred on the loading dock at its Denver facility on February 24, 1982. As conceded by the General Counsel, Blakeley had a disagreement with a Chrysler employee about the way she had loaded his truck and, instead of discussing it with Cobb, he complained directly to Chrysler management. According to Cobb, he was summoned to the dock by one of Respondent's employees. There he observed a dispute growing louder and louder between Blakeley and an employee of Chrysler. The Chrysler employee was a woman whose job was to load the truck which Blakeley was about to drive away. According to Cobb, Blakeley was complaining that the truck was not loaded properly and that it would require him, due to its improper loading, to unload and reload the truck several times while he made deliveries. At one point Blakeley referred to the female Chrysler employee as a "fat-ass."¹¹ In any event Cobb told Blakeley to go back to the office, and that, if anything had to be "handled," it should be done through Respondent's management and not directly with Chrysler under any circumstances. Cobb then went and reviewed the truck's loading with a member of the Chrysler's management and found everything proper. Cobb apologized to the Chrysler representative, who had simply turned and walked away from Blakeley when Blakeley approached him and in a loud voice began complaining about the situation. Cobb recalled the Chrysler representative as being upset to the point that he said that "I don't have to put up with this kind of shit." Cobb also quoted another management representative of Chrysler saying basically the same thing about 10 minutes later. Still later, the next

morning, Chrysler's depot management is reported by Cobb to have decreed that they did not want any of Respondent's employees. Rather, they were simply to deliver the freight on schedule and, failing that, it would be Chrysler's position that Respondent was not upholding its end of the contract and Chrysler would get somebody else to do it. Cobb recounted that Chrysler's depot manager threatened, if the conduct of the sort that had occurred the day before continued, he would see that the contract was voided and that he would make very sure that "Detroit" was aware of its position on the matter.

Accordingly, Cobb composed and delivered to Blakeley a lengthy memorandum in the nature of a reprimand. It read as follows, in pertinent part: "I am greatly upset over many aspects of this incident. One is the fact that you made your feelings well known in front of Chrysler employees and management instead of discussing it first with me. While I was doing my evening load check, you went directly to Mr. Ashton to discuss the matter."

Meanwhile, Chrysler's depot manager had elected to go directly by phone to Bruno in Boston about the matter. According to Bruno, Chrysler's depot manager, was "livid," even "venomous," in discussing this matter over the phone. Additionally, Bruno testified that he received a telephone call from another Chrysler official who had inquired as to why he could not "control his people." Still later Bruno received a call from "Detroit," from Chrysler's official in charge of awarding contracts. While this man did not tell Bruno that Blakeley was to be fired, Bruno recalled that he did say "if you have another incident over there, you are probably going to lose the contract."

Several days later, Bruno went to Denver and, together with other officials of Respondent, met with several officials of Chrysler. Their primary point of discussion was to agree on precisely how their employees would interact with one another.

On March 2, 1982, Cobb was on the telephone speaking to Ricardo in Boston. He was accompanied by Hensley, who was to be the new manager in Denver. Cobb overheard Blakeley remark that if his hours were cut he was going to the Labor Board.¹²

Cobb denied that Blakeley's remark played any part in the decision to terminate Blakeley, and would have it that he did not even realize that Blakeley was referring to the NLRB, as opposed to the Wage and Hour Division of the Department of Labor.

Bruno testified that a joint decision was made among management officials in Boston to fire Blakeley right after the incident on the dock between Blakeley and the female employee of Chrysler, and receipt of the telephone calls from Chrysler's management. Bruno acknowledged that he was in Denver on February 26, and that he even spent some time with Blakeley, yet failed to mention Blakeley's jeopardy to him. Bruno claimed that the failure was due to the fact that he was in Denver in order to conduct other business and that he had a tight schedule which involved further travel plans.

O'Boyle, and perhaps others, did so from time to time on their own. There is, however, no evidence of other runs being canceled due to weather conditions.

¹⁰ Bruno testified that the route could have been driven without violating DOT regulations. Perhaps that is so, but certainly not without violating speed limits.

¹¹ Blakeley's denial that he referred to this employee as a "fat-ass" was equivocal. When asked if he had so referred to her, he responded, "No, I don't believe I did. I don't use that type of language."

¹² Evidently, Blakeley's concern was aroused when, just prior to this incident, Cobb had questioned him about why Blakeley's usual scheduled hours per week had risen from 20 to 26.

E. Conclusions Regarding Blakeley's Discharge

As in O'Boyle's case, I conclude that Blakeley's discharge has not been adequately demonstrated to have been unlawful. My primary basis for the conclusion is the credibility resolution previously set forth herein.

Obviously Blakeley furnished just cause for Respondent's discharge of him, if he, in fact, was guilty of the incident with the female Chrysler employee on the loading dock and thereby caused Respondent's management to have reason to become apprehensive over the continued state of their contractual relationship with Chrysler. I find that Blakeley did refer to Chrysler's employee as a "fat-ass," and that he did loudly complain to or berate Chrysler's management.

Under these circumstances, whether Chrysler's management overreacted seems scarcely the point. For it is plausible to believe that they might, and did, advise Bruno in the fashion described by Bruno. I do not find the delay between Cobb's memorandum and the implementation of Bruno's decision to terminate to be so great as to warrant an inference that the termination was instead caused by Blakeley's intervening remark threatening to go to the Labor Board. Instead, for the reasons stated earlier, I credit Cobb, and conclude that despite Blakeley's remark on March 2, 1982, he was not thereby shielded from discharge on the following day.

Accordingly, I conclude that that portion of the complaint alleging that Respondent violated the Act in discharging Blakeley should be dismissed.

CONCLUSIONS OF LAW

1. Respondent Transportation Manpower Services of Ohio, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by interrogating an employee about his own, and others', activities on behalf of the Union, and by asking the employee to find out about the union activities of fellow employees and to report back about them.
4. Respondent has not violated the Act in any respect other than as found above.
5. The above unfair labor practices have an effect upon commerce as defined in the Act.

THE REMEDY

Having found Respondent has engaged in unfair labor practices it shall be recommended that it be ordered to cease and desist therefrom.

On the basis of the foregoing findings of facts and conclusions of law and on the entire record, I issue the following recommended¹³

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Transportation Manpower Services, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their own and others' activities on behalf of a union, or asking employees to find out about the union activities of fellow employees and report on them to Respondent.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following action designed to effectuate the purposes of the Act.

(a) Post at its facilities at Denver, Colorado, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹⁴ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything which interferes with these rights. More specifically, WE WILL NOT interrogate employees concerning their own or other employees' union activities, NOR WILL WE ask employees to find out about

the union activities of other employees and report them to us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of any rights guaranteed by the Act.

TRANSPORTATION MANPOWER SERVICES
OF OHIO, INC.